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No. 99-837

# In the Supreme Court of the United States

KENNETH CONLEY, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether it was error to allow a grand juror to testify at petitioner's perjury trial for the purpose of establishing the materiality of petitioner's false statements to the grand jury.

2. Whether the court of appeals improperly used an abuse-of-discretion standard in reviewing the district court's decision to grant the jury's request for a ruler to use in evaluating two trial exhibits that included an approximate scale for measurement.

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 186 F.3d 7.

### JURISDICTION

The court of appeals entered its judgment on July 23, 1999. A petition for rehearing was denied on August 26, 1999. The petition for a writ of certiorari was filed on November 16, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

After a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted of knowingly making false material declarations under oath before a grand jury, in violation of 18 U.S.C.

1623, and obstructing or endeavoring to obstruct the due administration of justice, in violation of 18 U.S.C. 1503. He was sentenced to 34 months' imprisonment, to be followed by two years of supervised release, and ordered to pay a fine of $6000. The court of appeals affirmed.

1. At about 2:30 on the morning of January 25, 1995, a shooting occurred at a restaurant in Boston. Because of a mistaken broadcast that the victim was a police officer, a large number of police cruisers from several different districts joined in the pursuit of the suspects, who were described as four black males driving a gold Lexus. One of those responding to the broadcast was Michael Cox, a plainclothes officer who was a passenger in an unmarked car. The chase ended when the Lexus drove into a cul-de-sac. The car in which Cox was riding was the first police vehicle on the scene, with others following immediately behind it. Petitioner, also a plainclothes officer, was riding in the fifth police car to reach the scene. Pet. App. 2a-3a.

Cox got out of his car and pursued a black male, wearing a brown leather jacket, who had started to run from the passenger side of the Lexus toward a chain-link fence about 20 feet away. Cox, who is also black, was wearing a black hooded sweatshirt and a black down jacket. He chased the suspect to the fence and attempted, unsuccessfully, to grab the suspect after the suspect's jacket caught temporarily at the top of the fence. Cox did not observe anyone else climb over the fence between him and the suspect. Pet. App. 3a-4a.

After the suspect got over the fence he fell backwards down a hill, hit a tree, and remained on the ground for a moment. Pet. App. 4a, 8a. As Cox attempted to climb the fence in pursuit he felt a sharp blow to the back of his head, which knocked him to the

ground. While on his hands and knees, trying to get up, he saw a white male standing in front of him, wearing boots and a dark uniform. Several different people then kicked Cox repeatedly in the head, back, face, and mouth, until someone yelled, "Stop, stop, he's a cop, he's a cop." *Id.* at 4a. After the beating stopped, Cox had to pull himself off the ground by using the bumper of a police car, because no one came to his aid. *Ibid.*

2. In April 1997, a federal grand jury began investigating the beating of officer Cox and the failure to secure medical attention for him after he was injured. When petitioner was called to testify before the grand jury, he initially invoked his privilege against self-incrimination. Pet. 8. After receiving an order granting him immunity under 18 U.S.C. 6002, petitioner testified that he had pursued the suspect, climbing over the fence "within seconds" after the suspect and in "approximately the same location," after which he chased the suspect for about a mile before catching and arresting him. He stated that he had not seen anyone else, in uniform or in plain clothes, between him and the suspect, and that he had not seen any beating of Cox. Pet. App. 5a-6a; see *id.* at 19a-22a.

The grand jury eventually indicted petitioner on three charges related to his testimony. The first count charged that petitioner made a false material declaration, in violation of 18 U.S.C. 1623, when he denied that he saw Cox chase and grab hold of the suspect as the suspect climbed over the fence out of the cul-de-sac. The second count charged that petitioner also testified falsely when he denied that he saw others beat and kick Cox. The third count charged that petitioner obstructed and attempted to obstruct the grand jury's investigation by giving false, evasive, and misleading

testimony and by withholding information, in violation of 18 U.S.C. 1503. Pet. App. 9a.

In order to meet its burden, under Section 1623, of proving that petitioner's declarations were material to the grand jury's investigation, the government called a member of the grand jury to testify about the nature and scope of the investigation. Petitioner moved to exclude the grand juror's testimony, arguing that admitting it would violate his right to a presumption of innocence and the secrecy provisions of Rule 6 of the Federal Rules of Criminal Procedure, and that its probative value was substantially outweighed by the danger of unfair prejudice under Rule 403 of the Federal Rules of Evidence. See Pet. 10. After reviewing the proposed testimony, the court permitted the grand juror to testify, but directed the government not to elicit information concerning the grand jury's deliberations. Pet. 10. Petitioner did not cross-examine the witness.

The remainder of the trial evidence focused on differences between petitioner's grand jury testimony and the testimony of others concerning the relevant events. See Pet. App. 20a-22a. Cox's testimony was corroborated, first, by the suspect apprehended by petitioner. At petitioner's trial, the suspect testified that after he had made it over the chain-link fence he stayed on the ground for a few moments, and that through the fence he saw a uniformed police officer prevent a man fitting Cox's description from climbing the fence after the suspect, by hitting the man twice on the back of the head with something shaped like a pipe. *Id.* at 8a-9a, 22a. He then saw three or four other police officers go over and begin to kick the man who had been knocked off the fence. *Id.* at 9a. As he stood up to run, the suspect made eye contact with a tall white police officer who was standing near the group of officers kicking the

fallen man, and that officer then chased and eventually arrested the suspect. *Ibid.* Officer Walker, another police officer who was on the scene, also corroborated Cox's account that Cox had chased the suspect to the fence and reached for him as he went over it, thus placing Cox "at the exact same time at the exact same place where [petitioner] claim[ed] to have climbed over the fence" himself. *Id.* at 21a-22a; see also *id.* at 6a-8a.

During the trial the government introduced into evidence a diagram of the area in which the beating occurred, and an overlay for that exhibit on which Officer Walker had drawn various routes, persons, and vehicles. See Pet. App. 28a n.20. Petitioner did not object to the admission of either exhibit. *Id.* at 29a. After the jury retired to deliberate, it sent a note to the judge requesting a ruler. *Id.* at 28a. The court granted the request, over petitioner's objection, but it instructed the jury that the ruler was to be used only on exhibits that contained an approximate scale for measurement. The diagram and the overlay were the only two exhibits that contained such a scale. *Id.* at 28a & n.20.

The jury found petitioner guilty of having lied when he denied seeing Cox chase the suspect and of obstructing or endeavoring to obstruct the grand jury's investigation. It acquitted him of the charge that he also lied when he denied seeing others beat Cox. Pet. App. 9a-10a.

3. The court of appeals affirmed. Pet. App. 1a-35a. The court considered and rejected petitioner's argument that the grand juror's testimony was unduly prejudicial, and should have been excluded under Federal Rule of Evidence 403. Pet. App. 12a-16a. The court observed that the testimony was "clearly relevant to materiality," an element of the false-statement charges.

*Id.* at 13a; see *id.* at 10a, 14a. Noting that testimony from a grand juror is an appropriate, and in some courts the favored, method for proving materiality, and that the jury in this case returned a verdict partially favorable to petitioner, the court found no evidence to support petitioner's theory that "the petit jurors were improperly influenced by their sense of identity or 'camaraderie'" with a grand-juror witness. *Id.* at 14a & n.6. Pointing to the district court's "thorough instructions concerning the presumption of innocence and the government's burden to prove its case beyond a reasonable doubt," the court also rejected petitioner's arguments that testimony from a grand juror caused confusion about the standard of proof at trial, or invited the jury to infer guilt from the fact of indictment. *Id.* at 15a; see *id.* at 12a.[1]

The court of appeals also agreed with the government that admission of the grand juror's testimony did not violate Rule 6(e) of the Federal Rules of Criminal Procedure. Pet. App. 16a-18a. The court held that the Rule's express authorization of disclosure to "an attorney for the government for use in the performance of such attorney's duty" covered both the grand juror's disclosures to the prosecutor in this case and his further use of that information in a prosecution for making false statements to the grand jury. *Id.* at 17a-18a.

The court rejected petitioners' argument, advanced for the first time on appeal, that admission of the grand juror's testimony called for inquiry into grand jury deliberations in violation of Rule 606(b) of the Federal

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[1] The court noted that although the district court expressly solicited suggestions for additional instructions to make clear that the indictment was not part of the evidence, petitioner's counsel did not submit any such instructions. See Pet. App. 15a & n.8.

Rules of Evidence. *Id.* at 11a. The court declined to consider that issue for the first time on appeal, "except to say that plain error is plainly absent." *Ibid.* Relying on its own prior cases and those of other circuits, the court held that grand juror testimony is "an appropriate and acceptable means of proving materiality in prosecutions brought under [18 U.S.C.] 1623." *Id.* at 14a n.6.

Finally (insofar as is relevant here), the court rejected petitioner's contention that the district court violated his Sixth Amendment right to confrontation when it granted the jury's request for a ruler. Pet. App. 28a-29a.[2] Although the court disagreed with the government's argument that a ruler is merely a "generic tool," like a magnifying glass, that may "aid a jury in examining exhibits," it pointed out that petitioner never objected, at trial or on appeal, to the admission of the two exhibits that contained an approximate measurement scale. *Id.* at 28a. The court reasoned that once those "imprecise depiction[s] of the crime scene" were properly before the jury, the "request for a ruler was both for[e]seeable and reasonable," and the district judge "acted within his discretion when he granted the jury's request." *Id.* at 29a.

## ARGUMENT

1. Petitioner argues (Pet. 9-11) that the district court erred in admitting testimony by a member of the grand jury before which petitioner made his false state-

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[2] The court also held that the evidence was sufficient to support petitioner's conviction (Pet. App. 18a-22a), that the district court did not abuse its discretion by refusing to admit the entire grand jury transcript (*id.* at 23a-28a), and that the district court correctly applied the Sentencing Guidelines (*id.* at 30a-35a). Petitioner does not challenge those rulings in this Court.

ments. The government introduced that evidence in order to carry its burden of proving that petitioner's false statements were "material" to the grand jury's investigation, an element of the offense defined by 18 U.S.C. 1623. Although petitioner provides almost no explanation of his claims, he asserts (Pet. 10) that the grand juror's testimony "violate[d] his right to the presumption of innocence," "violate[d] Rule 6 of the Rules of Criminal Procedure," and was prejudicial to an extent that "greatly outweighed" its probative value. The court of appeals correctly rejected those contentions. Pet. App. 12a-18a.

a. As both the district court and the court of appeals recognized, admission of testimony by a grand juror did not affect the presumption of innocence accorded to petitioner. Pet. App. 15a; III Tr. 70-71. The district court repeatedly instructed the jury about the presumption of innocence, and that indictment by the grand jury is not evidence of guilt. I Tr. 7, 17, 32; IV Tr. 87, 88, 95; see Pet. App. 15a. The court also invited petitioner to submit any additional instructions he might wish "in order to make it clear that in no way does receiving any testimony make the indictment a part of the evidence that the jury is to consider." Pet. App. 15a (quoting III Tr. 71). Petitioner made no such submission, and he suggests no reason to believe that the jury did not follow the court's instructions. See *Richardson* v. *Marsh*, 481 U.S. 200, 206-207 (1987).

b. The court of appeals also correctly rejected (Pet. App. 16a-18a) petitioner's argument that use of the grand juror's testimony violated Rule 6(e) of the Federal Rules of Criminal Procedure. As the court explained (*id.* at 17a-18a), government attorneys "have a duty to prosecute perjury [that occurs] before a grand

jury," and no court order is required for a government attorney to receive or use otherwise protected information for the purpose of preparing and trying such a case. See Fed. R. Crim. P. 6(e)(3)(A)(i); 1 C. Wright, *Federal Practice & Procedure: Criminal 3d* § 107 (1999); *United States* v. *Garcia*, 420 F.2d 309, 311 (2d Cir. 1970). Moreover, even if judicial supervision and a hearing were required in this context, see Fed. R. Crim. P. 6(e)(3)(C)(i) and (D) (providing that grand jury materials may be disclosed "when so directed by a court * * * in connection with a judicial proceeding," and that a petition for such disclosure may be heard ex parte when the petitioner is the government), they were supplied by the district court's pre-admission consideration of the proffered testimony and its consideration and rejection of petitioner's objection to admission of the testimony in this case. See III Tr. 74-92.

c. Finally, there is no merit to petitioner's claim (Pet. 10-11) that the danger of unfair prejudice outweighed the probative value of the grand juror's testimony, in violation of Rule 403 of the Federal Rules of Evidence. The testimony was obviously highly probative, going directly to support the government's burden of proof on the materiality element of the false-statement charges against petitioner. See Pet. App. 13a-14a & nn.5-6. The petition offers no argument concerning why the testimony posed any danger of "unfair prejudice" (Fed. R. Evid. 403) at all, and the court of appeals correctly rejected the conjectural argument petitioner made in that court that the petit jurors considering his case might have been "improperly

influenced by their sense of identity or 'camaraderie'" with the witness. See Pet. App. 14a-15a.[3]

As the court of appeals recognized (Pet. App. 14a n.6), introduction of a grand juror's testimony is a conventional way for the government to prove materiality in a false-statement prosecution. See *United States* v. *Abroms*, 947 F.2d 1241, 1247 (5th Cir. 1991), cert. denied, 505 U.S. 1204 (1992); *United States* v. *Nazzaro*, 889 F.2d 1158, 1165 (1st Cir. 1989); *United States* v. *Farnham*, 791 F.2d 331, 334 (4th Cir. 1986); *United States* v. *McComb*, 744 F.2d 555, 563 (7th Cir. 1984); *United States* v. *Ostertag*, 671 F.2d 262, 265 (8th Cir. 1982); *United States* v. *Byrnes*, 644 F.2d 107, 111 (2d Cir. 1981); *United States* v. *Cosby*, 601 F.2d 754, 758 (5th Cir. 1979). Although petitioner points out (Pet. 11) that these cases were decided before this Court held that materiality was to be proved to the jury rather than to the judge, see *United States* v. *Gaudin*, 515 U.S. 506 (1995), he does not explain why that should change the method of proof, or why petit juries are not capable of fairly evaluating testimony by a grand juror concerning the scope of the grand jury's investigation. Nor does he suggest the existence of any conflict in the lower courts on this point, either before or after *Gaudin*. His claim that the district court abused its discretion under Rule 403 by admitting the grand juror's testimony is meritless, and does not warrant review by this Court.

2. Petitioner renews in this Court (Pet. 11-12) his contention, first raised in the court of appeals, that

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[3] As the court of appeals noted (Pet. App. 14a-15a), any claim of unfair prejudice is especially weak in a case, like this one, in which the jury split its verdict. See *United States* v. *Dworken*, 855 F.2d 12, 29 (1st Cir. 1988).

admission of the grand juror's testimony violated Rule 606(b) of the Federal Rules of Evidence, because it "impeached the failure of the grand jury to return any indictments in connection with the beating" of Officer Cox (Pet. 12). The court of appeals correctly reviewed that claim only for plain error, because petitioner's objections to the grand juror's testimony at trial were based on other grounds. See Pet. App. 11a. Because the objection did not point to Rule 606(b) as a "specific ground" for objection, and because reliance on that Rule certainly was not "apparent from the context," the claim may be reviewed only for plain error. See Fed. R. Evid. 103(a)(1) and (d).

As the court of appeals observed (Pet. App. 11a), "plain error is plainly absent." Rule 606(b) applies when there is "an inquiry into the validity of a verdict or indictment"—circumstances not present in this case. Here, the grand juror testified only as to the nature and scope of the grand jury's investigation. She added that "after [petitioner's] testimony the grand jury did not have any more evidence concerning the identity of the officers who beat Cox or the identity of any witnesses to the beating", and that "at the time she ended her service as a grand juror, the grand jury had not returned any indictments for the assault" on Cox. Pet. App. 14a. The trial judge carefully precluded any intrusion into the deliberations of the grand jury, or the witness's own emotions or mental processes, by limiting the testimony to objective observations from which inferences might be drawn about what was material to the grand jury. See Pet. 10; Pet. App. 13a-14a; see also, *e.g.*, III Tr. 77. Admission of the grand juror's testimony did not violate Rule 606(b) at all, and certainly did not constitute "plain error."

3. Finally, petitioner argues (Pet. 12-15) that the court of appeals erred in sustaining the district court's decision to grant the jury's request to have a ruler, while instructing them that it was to be used only on exhibits that contained an approximate scale for measurement. See Pet. App. 28a-29a. That claim does not warrant review.

First, the ruler did not constitute improper "extrinsic evidence" that should have been kept from the jury. Although the court of appeals disagreed with the government on this point (Pet. App. 28a-29a), the ruler was merely a generic tool, not in any sense evidentiary in itself, that could aid the jury in evaluating evidence that had been properly admitted at trial. See *United States* v. *George*, 56 F.3d 1078, 1084 (9th Cir. 1995) (magnifying glass), cert. denied, 522 U.S. 1138 (1998); *United States* v. *Young*, 814 F.2d 392, 396 (7th Cir.) (same), cert. denied, 484 U.S. 838 (1987); *United States* v. *Brewer*, 783 F.2d 841, 843 (9th Cir.) (same), cert. denied, 479 U.S. 831 (1986); cf. *United States* v. *Bizanowicz*, 745 F.2d 120, 123 (1st Cir. 1984) (not error for district court to provide jury with tape player to accompany audio tape admitted into evidence).

Second, as the court of appeals explained (Pet. App. 29a), petitioner did not object to the admission into evidence of the two exhibits, containing an "approximate scale for measurement" (*id.* at 28a & n.20), that the jury was permitted to use the ruler to examine. Once those exhibits were in evidence, it was "both foreseeable and reasonable" for the jury to request a ruler to assist it in evaluating them. *Id.* at 29a. The district court's decision to grant that request was equally reasonable.

Third, although petitioner cites a number of cases that he contends adopt conflicting standards for the appellate review of district courts' rulings on "extrinsic

evidence" claims, see Pet. 13-14, those cases do not suggest any ground for review here. They deal with very different factual situations, in which jurors were exposed to truly extrinsic evidence, initially without the knowledge of court or counsel. See, *e.g.*, *United States* v. *Navarro-Garcia*, 926 F.2d 818, 820, 822 (9th Cir. 1991) (juror conducted out-of-court experiment to test credibility of defendant's testimony); *United States* v. *Wood*, 958 F.2d 963, 965 (10th Cir. 1992) (prosecutor's notes from trial found in jury room); *Marino* v. *Vasquez*, 812 F.2d 499, 505 (9th Cir. 1987) (out-of-court experiment to test defense theory of case, and dictionary definition of "malice" copied by a juror); *United States* v. *Bruscino*, 687 F.2d 938, 940-941 (7th Cir. 1982) (en banc) (documents not in evidence, including Bureau of Prisons memorandum concerning one of the defendants and newspaper clipping concerning the case), cert. denied, 459 U.S. 1211 (1983); *Osborne* v. *United States*, 351 U.S. 111, 113, 117 (8th Cir. 1965) (transcript of grand jury proceedings, not admitted into evidence, containing inadmissible and prejudicial material).

Moreover, the cases petitioner cites generally agree that a court of appeals should review only for abuse of discretion a district court's decision whether or not to grant relief in a true "extrinsic evidence" case. See, *e.g.*, *United States* v. *De La Vega*, 913 F.2d 861, 871 (11th Cir. 1990) (district court "did not abuse its discretion in determining that the jury's exposure to this material was harmless beyond a reasonable doubt"), cert. denied, 500 U.S. 916 (1991); *United States* v. *Carson*, 9 F.3d 576, 589 (7th Cir. 1993), cert. denied, 513 U.S. 844 (1994); *Wood*, 958 F.2d at 965-966; *United States* v. *Griffith*, 756 F.2d 1244, 1251-1253 (6th Cir.), cert. denied, 474 U.S. 837 (1985); *United States* v. *Hillard*, 701 F.2d 1052, 1064 (2d Cir.), cert. denied, 461

U.S. 958 (1983); *Bruscino*, 687 F.2d at 940; *Osborne*, 351 F.2d at 116-117. The decision below does not conflict with those cited by petitioner in any manner that would call for review by this Court.[4] See also *Marshall* v. *United States*, 360 U.S. 310, 312 (1959) (per curiam) ("The trial judge has a large discretion in ruling on the issue of prejudice resulting from the reading by jurors of news articles concerning the trial. Generalizations beyond that statement are not profitable, because each case must turn on its special facts.") (citation omitted); *Holt* v. *United States*, 218 U.S. 245, 251 (1910) (opinion of Holmes, J.).

In *United States* v. *Santana*, 175 F.3d 57 (1999), the First Circuit applied a "harmless error" standard on review, where the district court had permitted a deliberating jury to observe the defendant's ears, which had been described as "protruding" by a witness but which had been covered by headphones throughout the trial. *Id.* at 61, 63. Where "[t]here was no opportunity for further cross-examination of prosecution witnesses or for the defense to introduce rebuttal evidence; [defendant's] interpreter was not present; the parties were not permitted to make additional arguments to the jury; and the court itself acknowledged that it

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[4] All but one of the cases petitioner cites (Pet. 13-14) hold or state that the *district court* should conduct a version of the "harmless error" analysis he advocates (see Pet. 15). The Sixth Circuit's decision in *United States* v. *Griffith*, 756 F.2d at 1252, indicates that, in a case involving unauthorized use of a dictionary, the defendant would have had to convince the district court that he suffered "actual prejudice" in order to merit relief. *Griffith* makes clear, however, that the court of appeals would review the district court's determination in that regard only for abuse of discretion. Accordingly, it does not support petitioner's claim of a conflict relevant to this case.

purposely 'minimized' the occasion," the court held that the district court's decision would not be reviewed for abuse of discretion, but was "subject to de novo review" and was "error per se." *Id.* at 64-65; see also *id.* at 65 ("The jury's exposure during its deliberations to extrinsic information, whatever its source, is an error of constitutional proportions that is grounds for setting aside the verdict, unless the exposure was harmless.") (footnote omitted). Even if the decision in *Santana* conflicted with the same court's decision on the substantially different facts of this case, however, such an intracircuit disagreement would provide no basis for review by this Court. *Davis* v. *United States*, 417 U.S. 333, 340 (1974); *Wisniewski* v. *United States*, 353 U.S. 901 (1957).[5]

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2000

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[5] Although petitioner sought en banc review in the First Circuit on the basis, in part, of a claimed conflict with *Santana*, that court denied en banc review.